In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1123

HAROLD WEINHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring with, and aiding and abetting, a union official in requesting a payment from the officials of the Michigan Chrome and Chemical Company, in violation of 29 U.S.C. 186, 18 U.S.C. 371 and 18 U.S.C. 2(a).[1] He was sentenced to im-

[1] The union official pleaded guilty before trial.

prisonment for one year (1 R. 1-4, 38, 44),[2] and the court of appeals affirmed *per curiam*.

1. Relying on testimony that petitioner was not an authorized representative of any employees of Michigan Chrome and Chemical Company, petitioner argues that he was not a person subject to the prohibitions of the Taft-Hartley Act, 29 U.S.C. 186.[3] Pe-

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[2] "1 R." and "2 R." refer, respectively, to the appellant's and the government's appendices in the court of appeals.

[3] 29 U.S.C. 186(a) and (b)(1) provide as follows:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
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> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
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> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his

titioner's co-defendant, however, the Secretary-Treasurer and Business Representative of the Teamster's local named in the indictment, was clearly subject to the statute. *United States* v. *Ryan*, 350 U.S. 299, 302. It is well settled that a person who is not himself within the class defined by a criminal statute may aid and abet the commission of an offense (*Coffin* v. *United States*, 156 U.S. 432, 446-447; *Coffin* v. *United States*, 162 U.S. 664, 666-667) or conspire to commit it (*United States* v. *Holte*, 236 U.S. 140, 144-145; *United States* v. *Rabinowich*, 238 U.S. 78, 86). It is therefore not necessary to reach the question whether petitioner's representation that he was a "labor relations advisor" would, independently of his connection with his co-defendant, bring him within the statute as one who "seeks to represent" the employees of the company.

2. Petitioner's counsel made the following argument to the jury (2 R. 1):

> There was no need for the defendant to testify. He gave his explanation in this case when he was first questioned and it still stands and he says he wasn't guilty then and he says that now he is not guilty.

In reply, government counsel made the following argument, to which petitioner excepted (1 R. 35):

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actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

> Mr. Prosser [petitioner's counsel] indicated there has been no testimony by the defendant himself, I don't mean evidence in his behalf, but he did not take the stand and you should not use this against him, and that is very true. The law does protect a man in that kind of situation. On the other hand, Mr. Prosser did say something in that connection which is not quite true, not quite accurate. He said Mr. Weinhart has presented evidence to you by his plea of not guilty. That is not so. Mr. Weinhart was never on the witness stand and any plea of not guilty that he made was not made under oath.

The court instructed that no inference of guilt was to be drawn from the failure of petitioner to testify (1 R. 17-18).

The argument of petitioner's counsel that petitioner had made an "explanation in this case when he was first questioned" was neither fair nor accurate. It was a proper reply that petitioner had never been on the witness stand and that his plea of not guilty was not under oath. Especially in view of the court's clear instruction on the subject, there was no error. *Baker* v. *United States*, 115 F. 2d 533, 544 (C.A. 8), certiorari denied, 312 U.S. 692.

3. During its deliberations, the jury asked to have a copy of the indictment. Over petitioner's objection, the court granted the request but cautioned the jury as follows (1 R. 36-37):

> I must repeat, it is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

> If you wish it, for the purpose only of seeing the charge herein—don't forget, I read it to you twice—then I want you to approach it from that viewpoint, and that viewpoint alone.

This was a proper exercise of discretion, especially in view of the cautionary instruction which the court gave. *Haupt* v. *United States*, 330 U.S. 631, 643; *United States* v. *Press*, 336 F. 2d 1003, 1016-1017 (C.A. 2), certiorari denied, 379 U.S. 965.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

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v.

UNITED STATES OF AMERICA,

PETITION FOR REHEARING

EARL T. PROSSER,
Attorney for Petitioner,
1837 First National Building,
Detroit, Michigan 48226.

EDWARD P. ECHLIN,
Of Counsel,
705 Ford Building,
Detroit, Michigan 48226.

Interstate Brief & Record Co., 356 Congress St. E., Detroit, Michigan 48226

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Harold Weinhart presents this his petition for a rehearing of the above entitled matter, and, in support thereof, respectfully shows:

1. That due to Counsel's endeavor to be concise, other grounds of a substantial nature or of controlling effect as will more fully hereinafter be set forth, were not presented and as permitted by Supreme Court Rule 58.

2. That before Counsel was able to file a reply brief to the Government's Memorandum Brief herein, decision was made.

3. That in the Government's Memorandum brief, several erroneous conclusions as to the law, the rules of evidence and statements as to facts which were not, and could not properly be received in evidence, were set forth, which are as follows:

—1—

In said Memorandum Brief, the statement is set forth at the very first page under foot-note 1, that Petitioners co-defendant the union official pleaded guilty before trial. Why this wholly extraneous matter should be interjected is difficult to comprehend as being for any other purpose than to attempt to prejudice the petitioner before this Court, or the Justice who denied the petition. Certainly, if testimony had been received to establish that a co-defendant had pleaded guilty it would have been reversible error. Moreover, not a single scintilla of evidence was offered by Government witnesses to the effect that Ralston and Weinhart either knew each other or were ever seen together. We have always thought and still firmly believe that in all courts this side of the Iron Curtain that "*guilt by association*" is not conducive to a fair and impartial trial, is of no evidentiary value whatsoever, and more than that, to attempt so to condemn an accused would be a highly reprehensible act.

The purpose of bringing this matter to the court's attention, although the record is devoid of any mention of it, is that it at least leads to the suspicion that the object in so doing was to prejudice the accused.

Next, the Government Counsel contend in the Memorandum Brief (pp. 2, 3) that even if Petitioner was not a Labor Relations expert, adviser, or consultant, as defined

in the Act of Congress, Title 29, U.S.C. 186, he was liable upon the theory that he comes within the purview of some unspecified and undesignated criminal statute, which makes him liable to prosecution for the violation of the provision of the Taft-Hartley Act *supra, if he aids and abets another in the commission of the offense.*

However, Petitioner was not charged with aiding and abetting, but could only be charged with the commission of the substantive offense. In 27 Am. Jur., p. 653, Section 93, the law is stated to be as follows:

> "It is the strict rule of the common law that one who participates in the commission of a crime must be charged as such in an indictment or information and that one who aids and abets the commission of the offense must be charged as such, and not as principal. Expressed in other terms, this rule is that one charged as a principal only cannot be convicted as an accessory or accomplice. * * *"

Coffin v. U. S. (1894), 156 U.S. 432 and 162 U.S. 664 are cited by Government counsel as apparent authority for the argument as to aiding and abetting. However, in *Coffin,* the defendant was charged with soliciting or inciting to the commission of crime (quite a different offense than that charged in the case at bar) in violation of the Revenue Statute, then in force, pertaining to national banks and which specifically defined aiding and abetting an officer, etc., of a national bank as being a violation of such Act. It is difficult to understand how it can be seriously contended that this case is authority for any issue involved in the case at bar.

In *United States v. Holte,* 236 U.S. 140, next urged as authority, it was there held that a woman could conspire with another to commit an offense against the United

States, although the object of the conspiracy, was her own transportation in interstate commerce for purposes of prostitution.

In a much later case, cited in our brief (6), *Gebardi v. United States,* 287 U.S. 112, 77 L.ed. 210, this Court held as follows:

> "*The Act does not punish the woman for transporting herself;* it contemplates two persons—one to transport and the woman or girl to be transported. *Of this class of cases we say that the substantive offense involves the same combination or community or purpose of two persons only one of which is prosecuted here as a conspiracy where it is impossible under any circumstances to commit the substantive offense without co-operative action, the preliminary agreement between the same parties is not an indictable offense either at common law, Shannon v. Com., 14 p. 226, or under the Federal statute.*" (Emphasis added.)

In *United States v. Rabinowich,* 238 U.S. 78, 86 (1914) likewise relied upon by Government Counsel for the argument as to aiding and abetting, which obviously they feel is the only shield they have for affirmance, the Court contrary to their claim and actually in support of petitioner's contention, held that under Criminal Code, section 37, *a conspiracy to commit a crime is a different offense from the crime that is the object of a conspiracy.*

THE INDICTMENT CHARGES NO OFFENSE AGAINST THE STATUTES OF THE UNITED STATES.

Count One of the Indictment charges petitioner and Louis T. Ralston with a conspiracy to violate Section 186, (a) Title 29, U.S.C.A.

Count Two charges petitioner and the said Louis T. Ralston with having violated Section 186 (b) of the same Act.

Count One therefore charges a conspiracy to violate a specific Act and Count Two charges the substantive offense of violating the same Act. Petitioner was convicted of both crimes.

Title 29, U.S.C. 186 (a) provides in part as follows:

> "(a) It shall be unlawful for any person *who acts as a labor relations expert, adviser or consultant to an employer, or who acts in the interest of an employer, to pay, lend, or deliver, any money or other thing of value.* * * *
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions or duties, as a representative of employees or as such officer or employee of such labor organization."